



Employee Fails to Return from Leave — Be Cautious Before Termination

Imagine This Scenario: An employee with a history of performance issues is suspended for three days. She then takes a one-week medical leave immediately after her suspension. The medical leave ends, but she doesn't come back to work.

There is a dispute about whether she told you she might need more time off following the one week, and you don't think she is asking for more leave. Your policy is that five days of unexcused absences is considered a voluntary resignation. (Most company policies allow only for three days no call-no show).

Should You:

1. Tell her that she no longer works for you?
2. Or try to get more information about why she continues to be absent before making a decision to terminate her employment?

When presented with a similar scenario in a lawsuit filed by a former employee against her employer, a California Court of Appeal voted for option number two.

Under the California Family Rights Act (CFRA), an employer bears the burden to communicate with an employee if the employer needs more information regarding the employee's leave request. Moreover, employers should give employees a "reasonable" amount of time to request leave and to provide supporting documentation (*Ms. A vs. San Diego Community College Dist*, 7 Cal.App.5th 546 (2017)). (Note that the CFRA like the FMLA only applies to employers with 50 or more employees; however the basic concepts of this case still have applications for all employers).

Background:

Employee A, an administrative assistant with the San Diego Community College District, was suspended for performance issues in 2006 and again in 2013. At the end of the 2013 suspension, Ms. A notified the college that she needed to take a one-week medical leave. When requested, she provided the college with supporting documentation from a doctor stating that she needed to be out for medical reasons.

At the end of the one-week leave, Ms. A emailed her supervisor's boss stating that she was out on a medical leave and would notify all concerned parties of her return. She also allegedly emailed her direct supervisor a new doctor's note stating that she would be out on medical leave for a second week. The college denied ever receiving that email.

When Ms. A was absent for five consecutive days during the second week, the college sent her a letter informing her that her unauthorized absences constituted a voluntary resignation. Then, when Ms. A received the letter, she allegedly contacted the college and provided documentation supporting the medical necessity of her absences during the second week. However, the college didn't reconsider its decision and informed Ms. A that her documentation didn't support her claim that she requested a leave of absence for the second week.

Ms. A sued for retaliation under the CFRA. The college moved to have the case stopped before trial (a motion for summary judgment). The court of appeal ruled that there was sufficient evidence to allow the case to proceed to trial.

Sufficient Notice of Need for Leave:

The CFRA does not specifically define what constitutes a valid request for CFRA leave. However, the Department of Fair Employment and Housing implemented regulations that state:

- An employee must provide at least sufficient verbal **notice** to make the employer aware that the employee needs CFRA leave and the anticipated timing and duration of the leave.
- The employee does not need to explicitly assert rights under CFRA or the Family and Medical Leave Act (FMLA), or even mention CFRA or FMLA, to meet the notice requirement. However, the employee must state that the reason the leave is needed, such as the expected birth of a child or the need for medical treatment.
- Even if the employee mentions "vacation," other paid time off or resignation, this doesn't mean that the employee's notice is insufficient, as long as the underlying reason for the request is CFRA-qualifying, and the employee communicates that reason to the employer.
- If necessary, the employer should gather more information from the employee to determine whether the employee is requesting CFRA leave and obtain the necessary information concerning the leave (i.e., commencement date, expected duration and other permissible information).
- An employee has an obligation to respond to an employer's questions that are designed to help the employer determine whether an absence is potentially CFRA-qualifying.

In some circumstances, CFRA leave can begin before the employer receives certification. The court's opinion also noted that the general scheme of the CFRA is set up to provide employees with a "reasonable time" to request leave and provide supporting documentation, "particularly when the need for leave is not foreseeable or when circumstances have changed subsequent to an initial request for leave."

Given the CFRA's general structure, the court found that Ms. A's attempts to contact the college about her need for the second week of leave could be considered a reasonable request for more CFRA leave.

Burden on Employer to Ask More Questions:

The court emphasized that it was the college's responsibility to communicate with Ms. A if it needed more information.

The court found that, under the facts presented, the case should at least be heard by a jury because there was evidence that the college didn't meet this responsibility. The college knew she was out for medical leave the first week but never engaged with Ms. A during the second week of absence. Instead, the college just waited out the five days and sent the letter informing her of the voluntary resignation.

Moreover, Ms. A allegedly sent other communications to the college to notify the appropriate personnel that she was going to be absent for a second week due to medical leave and that she was not voluntarily resigning or abandoning her job. The appellate court allowed the case to proceed to trial on the issue of retaliation.

Best Practices - Important Practices for Employers:

- Review any attendance policies which automatically terminate employment after a set number of absences. Remember that absences which are protected by law - CFRA absences - should never count as a violation of your attendance policy. Employees should be informed that protected absences will not count as a violation of your attendance policy.
- If an employee doesn't return to work immediately after a protected medical leave, don't assume that he/she isn't coming back. Take the time to communicate with the employee as to why he/she continues to be absent and give the employee a reasonable amount of time to request additional protected leave. In most cases, these leave laws will be interpreted broadly to protect the employee.
- Follow the rules regarding timeliness of medical certification. Don't ignore extenuating circumstances.
- Even if an employee has exhausted all of his/her CFRA/FMLA leave, you may have a duty to extend the employee's leave as a reasonable accommodation for a disability. Again, don't automatically terminate the employee. Instead, initiate the interactive process to try and come up with a solution for a reasonable accommodation of any continuing disability. (At least offer to meet with the employee in person, ask what limitations they are experiencing and if you have questions, call us at CalWorkSafety.com)
- Consult legal counsel before terminating an employee who failed to return from a leave.

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